

EXHIBIT 5
DATE 2/22/07
HB 684

LEGAL MEMO

TO: GLENN OPPEL, GOVERNMENT AFFAIRS DIRECTOR,
MONTANA ASSOCIATION OF REALTORS
FROM: MICHAEL S. KAKUK, ATTORNEY
RE: HB0684, BILL MEMO
DATE: FEBRUARY 20, 2007

PURPOSE AND DISCLAIMER

I have been asked to prepare a brief outline of HB0684. This is provided below. This should be seen as a draft memo, as additional issues may become evident through testimony and further research.

BILL NUMBER: HB0684

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 7-6-1601, MCA, is amended to read:

"7-6-1601. Definitions. As used in this part, the following definitions apply:

(1) (a) "Capital improvements" means improvements, land, and equipment with a useful life of 10 years or more that increase or improve the service capacity of a public facility.

~~(b) The term does not include consumable supplies.~~

MSK COMMENTS: THIS AMENDMENT SETS UP THE POSSIBILITY FOR "CONSUMABLE SUPPLIES" TO BE DEFINED AS HAVING A USEFUL LIFE OF MORE THAN 10 YEARS. SUCH AS? THIS LANGUAGE WAS PUT IN THIS LAW SPECIFICALLY TO AVOID HAVING TO ARGUE THESE VERY ISSUES.

(2) "Connection charge" means the actual cost of connecting a property to a public utility system and is limited to the labor, materials, and overhead involved in making connections and installing meters.

(3) "Development" means construction, renovation, or installation of a building or structure, a change in use of a building or structure, or a change in the use of land when the construction, renovation, installation, or ~~other~~ action change in use creates additional demand for public facilities.

MSK COMMENTS: THIS AMENDMENT REMOVES "OTHER ACTION" AND THEN RESTATES THE LANGUAGE IN THE FIRST PART OF THE SENTENCE. NO FURTHER COMMENT.

(4) "Governmental entity" means a county, city, town, or consolidated government.

(5) (a) "Impact fee" means any charge imposed upon development by a governmental entity as part of the development approval process to fund the additional service capacity required ~~by the development from which it is collected~~ as a result of the development from which it is collected. An impact fee may include a fee for the administration of the impact fee not to exceed 5% of the total impact fee collected.

MSK COMMENTS: THIS IS AN IMPORTANT AMENDMENT IN THAT IT WOULD ALLOW LOCAL GOVERNMENTS TO ARGUE THAT, EVEN THOUGH THE ADDITIONAL SERVICE CAPACITY IS NOT "REQUIRED BY THE DEVELOPMENT" THE ADDITIONAL CAPACITY IS "A RESULT OF" THE NEW DEVELOPMENT. AGAIN, A DEVELOPMENT SHOULD ONLY HAVE TO PAY AN IMPACT FEE FOR THOSE IMPACTS CREATED BY THAT DEVELOPMENT. I'LL BE VERY INTERESTED IN HEARING BILL SUPPORTERS MAKE THE ARGUMENT FOR THIS AMENDMENT.

(b) ~~The term does not include:~~ The following charges and fees are not impact fees, and this part does not affect the ability of a governmental entity to assess the charges and fees:

MSK COMMENTS: LOOKING AT THE BILLS INTRODUCED REGARDING THIS ISSUE BY THOSE NOT INVOLVED WITH THE PASSAGE OF THE IMPACT FEE ACT (IFA) LAST SESSION, THIS CLARIFICATION MAY BE A GOOD IDEA.

(i) a charge or fee to pay for administration, plan review, or inspection costs associated with a permit required for development;

(ii) a connection charge;

(iii) any other fee authorized by law, including but not limited to user fees, special improvement district assessments, fees authorized under Title 7 for county, municipal, and consolidated government sewer and water districts and systems, and costs of ongoing maintenance; or

(iv) onsite ~~or offsite~~ improvements necessary for new development to meet the safety, level of service, and other minimum development standards that have been adopted by the governmental entity.

MSK COMMENTS: THIS AMENDMENT DOES NOT WORK AS IT SETS UP A THIRD CATEGORY OF EXACTIONS. CURRENTLY THERE ARE TWO TYPES OF EXACTIONS:

1. *ANY FEE ALREADY AUTHORIZED BY LAW IS AN EXACTION BUT IS NOT AN IMPACT FEE;*
2. *ANY FEE IMPOSED THROUGH THE IFA IS AN IMPACT FEE AND IS ALSO AN EXACTION.*

BUT NOW, THESE AMENDMENTS SET UP A THIRD TYPE OF EXACTION:

3. *ANY FEE FOR "OFFSITE" IMPROVEMENTS FOR WHICH LOCAL GOVERNMENTS ALREADY HAVE AUTHORITY TO IMPOSE AN EXACTION IS NOW ALSO AN IMPACT FEE.*

THIS LAST CATEGORY CONFLICTS WITH THE CLEAR INTENT OF THE DEFINITION OF AN IFA – IF YOU CAN ALREADY IMPOSE AN EXACTION - IT IS NOT AN IMPACT FEE. THIS AMENDMENT LEADS DIRECTLY AND IMMEDIATELY TO LEGAL ACTION TO SORT IT ALL OUT. I HAVE NO IDEA WHY BILL SUPPORTERS WOULD THINK THIS IS A GOOD IDEA.

(6) "Proportionate share" means that portion of the cost of capital system improvements that reasonably relates to the service demands and needs of the ~~project~~ development. A proportionate share must take into account the limitations provided in 7-6-1602.

MSK COMMENTS: GOOD CHANGES.

- (7) "Public facilities" means:
- (a) a water supply production, treatment, storage, or distribution facility;
 - (b) a wastewater collection, treatment, or disposal facility;
 - (c) a transportation facility, including roads, streets, bridges, rights-of-way, traffic signals, and landscaping;
 - (d) a storm water collection, retention, detention, treatment, or disposal facility or a flood control facility;
 - (e) a police, emergency medical rescue, or fire protection facility; and
 - (f) other facilities for which documentation is prepared as provided in 7-6-1602 that have been approved as part of an impact fee ordinance or resolution by:
 - (i) a two-thirds majority of the governing body of an incorporated city, town, or consolidated local government; or
 - (ii) a unanimous vote of the board of county commissioners of a county government."

Section 2. Section 7-6-1602, MCA, is amended to read:

"7-6-1602. Calculation of impact fees -- documentation required -- ordinance or resolution -- requirements for impact fees. (1) For each public facility for which an impact fee is imposed, the governmental entity shall prepare and approve documentation that: The governmental entity considering the adoption of impact fees shall conduct and adopt a needs assessment for each type of public facility for which impact fees are to be levied. The needs assessment must:

MSK COMMENTS: CREATES A NEW REQUIREMENT FOR, BUT DOES NOT DEFINE, A "NEEDS ASSESSMENT" BEFORE ADOPTING AN IMPACT FEE ORDINANCE. SEE ALSO MY COMMENTS BELOW REGARDING OTHER REFERENCES TO "NEEDS ASSESSMENT"

~~(a) describes existing conditions of the facility;~~

MSK COMMENTS: LOCAL GOVERNMENTS (LG'S) NO LONGER HAVE TO HAVE A BASE LINE FROM WHICH TO CALCULATE THE ACTUAL "IMPACT" OF A PROPOSED DEVELOPMENT. IF YOU DON'T KNOW WHERE YOU ARE -- YOU CANNOT FIGURE OUT HOW TO GET WHERE YOU WANT TO GO. SEE ALSO MY COMMENTS REGARDING THIS ISSUE, PAGE 5.

~~(b)(a) establishes level of service standards~~ establish standards for levels of service;

~~(b) project public facilities' capital improvement needs over a defined period of time; and~~

~~(c) distinguish existing needs and deficiencies from future needs.~~

MSK COMMENTS: HOW CAN YOU ACCOMPLISH THIS WHEN YOU ARE NOT REQUIRED TO DESCRIBE WHERE YOU ARE NOW? SEE MY ABOVE COMMENTS.

~~(e) forecasts future additional needs for service for a defined period of time;~~

~~—(d) identifies capital improvements necessary to meet future needs for service;~~

~~(e) identifies those capital improvements needed for continued operation and maintenance of the facility;~~

~~—(f) makes a determination as to whether one service area or more than one service area is necessary to establish a correlation between impact fees and benefits;~~

~~—(g) makes a determination as to whether one service area or more than one service area for transportation facilities is needed to establish a correlation between impact fees and benefits;~~

~~—(h) establishes the methodology and time period over which the governmental entity will assign the proportionate share of capital costs for expansion of the facility to provide service to new development within each service area;~~

~~—(i) establishes the methodology that the governmental entity will use to exclude operations and maintenance costs and correction of existing deficiencies from the impact fee;~~

~~(j) establishes the amount of the impact fee that will be imposed for each unit of increased service demand; and~~

~~—(k) has a component of the budget of the governmental entity that:~~

~~—(i) schedules construction of public facility capital improvements to serve projected growth;~~

~~(ii) projects costs of the capital improvements;~~

~~—(iii) allocates collected impact fees for construction of the capital improvements; and~~

~~—(iv) covers at least a 5-year period and is reviewed and updated at least every 2 years.~~

MSK COMMENTS: THESE ARE THE VERY REQUIREMENTS THAT MAKE THE IFA LEGAL – LG'S MUST SHOW THE IMPACT AND THEN SET THE FEE ACCORDINGLY. UNDER CURRENT LAW, TO LEGALLY IMPOSE AN IMPACT FEE LG'S MUST SHOW THREE THINGS FOR ANY CAPITAL FACILITY LEVEL OF SERVICE: WHERE THEY ARE NOW; WHERE THEY SHOULD BE GIVEN THE CURRENT SERVICE DEMAND ON THAT FACILITY; AND WHERE THEY NEED TO BE GIVEN PROJECTED GROWTH. THESE AMENDMENTS REMOVE THE REQUIREMENT FOR THIS SHOWING AND MUST CALL INTO QUESTION THE CALCULATION AND IMPOSITION OF EVERY IMPACT FEE DEVELOPED UNDER THE RESULTING INADEQUATE PROCESS. SEE ALSO MY COMMENTS IMMEDIATELY BELOW.

(2) The data sources and methodology supporting adoption and calculation of an impact fee must be available to the public upon request.

(3) The amount of each impact fee to be imposed may not exceed the development's proportionate share.

MSK COMMENTS: NICE SENTIMENT, BUT THESE AMENDMENTS STRIP OUT ALL THE REQUIREMENTS FOR ANY CALCULATIONS TO SHOW WHAT THAT PROPORTIONAL SHARE ACTUALLY IS. SEE MY COMMENTS IMMEDIATELY ABOVE.

~~(3)(4)~~ The amount of each impact fee imposed must be based upon the actual cost of public facility expansion capital improvements or ~~improvements~~ or reasonable estimates of the cost of capital improvements to

be incurred by the governmental entity as a result of new development. The calculation of each impact fee must be in accordance with generally accepted accounting principles.

MSK COMMENTS: AGAIN, STRIKING "AS A RESULT OF" THE NEW DEVELOPMENT IS A MAJOR POLICY SHIFT. IFA'S ARE LEGAL IN MONTANA BECAUSE LG'S MUST SHOW THAT THE DEVELOPMENT RESULTS IN AN IMPACT. WITHOUT THAT REQUIREMENT, THE IFA IS SIMPLY BLACKMAIL – PAY US OR YOU DON'T BUILD. NOTE THAT THESE AMENDMENTS WHILE STRIKING "AS A RESULT OF" ALSO ACTUALLY INSERT THE VERY SAME PHRASE INTO THE IFA IN SECTION (5)(A), PAGE 2 ABOVE.

~~(4)(5)~~ The ordinance or resolution adopting the impact fee must include a time schedule for periodically updating the documentation required under subsection (1).

~~(5) An impact fee must meet the following requirements:~~

- ~~(a) The amount of the impact fee must be reasonably related to and reasonably attributable to the development's share of the cost of infrastructure improvements made necessary by the new development.~~
- ~~—(b) The impact fees imposed may not exceed a proportionate share of the costs incurred or to be incurred by the governmental entity in accommodating the development. The following factors must be considered in determining a proportionate share of public facilities capital improvements costs:~~
 - ~~—(i) the need for public facilities capital improvements required to serve new development; and~~
 - ~~—(ii) consideration of payments for system improvements reasonably anticipated to be made by or as a result of the development in the form of user fees, debt service payments, taxes, and other available sources of funding the system improvements.~~
- ~~—(c) Costs for correction of existing deficiencies in a public facility may not be included in the impact fee.~~
- ~~—(d) New development may not be held to a higher level of service than existing users unless there is a mechanism in place for the existing users to make improvements to the existing system to match the higher level of service.~~

MSK COMMENTS: THE STRICKEN LANGUAGE PROVIDES IMPORTANT DUE PROCESS PROTECTIONS FOR THE DEVELOPMENT COMMUNITY AND BETTER INSULATES LG'S FROM LEGAL ACTION. HOW CAN YOU IMPOSE AN IMPACT FEE WITHOUT CONSIDERING, FOR EXAMPLE, HOW MUCH THE DEVELOPMENT WILL CONTRIBUTE TO THE LG IN THE FORM OF USER FEES AND TAXES? WITHOUT

THIS CONSIDERATION LG'S RUN THE RISK OF "DOUBLE DIPPING" AND GETTING SUED.

~~(e)(6)~~ Impact fees may not include expenses for operations and maintenance of the facility or costs for correction of existing deficiencies in a public facility."

MSK COMMENTS: ATTEMPTING TO REPLACE ALL THE ABOVE STRICKEN LANGUAGE WITH THIS ONE PHRASE, WHICH IS ALREADY IN THE IFA TO BEGIN WITH (SEE STRICKEN SUBSECTION (5)(C) ABOVE) IS INEFFECTIVE.

Section 3. Section 7-6-1603, MCA, is amended to read:

"7-6-1603. Collection and expenditure of impact fees -- refunds or credits -- mechanism for appeal required. (1) The collection and expenditure of impact fees must comply with this part. ~~The collection and expenditure of impact fees must be reasonably related to the benefits accruing to the development paying the impact fees. The ordinance or resolution adopted by the governmental entity must include the following requirements:~~

MSK COMMENTS: IN MY OPINION, THIS LANGUAGE IS NOT NECESSARY IN THE IFA AS PASSED LAST SESSION. HOWEVER, THIS LANGUAGE BECOMES VERY IMPORTANT CONSIDERING THE SERIOUS DEGRADATION OF DUE PROCESS PROTECTIONS CONTEMPLATED BY THE AMENDMENTS IN HB0684.

(2) Impact fees must be expended for the capital improvements on which the impact fee's calculation was based. Any impact fees that are not expended for the capital improvements on which the calculation was based must be refunded to the person who owned the property at the time that the refund was due.

MSK COMMENTS: THIS APPEARS TO BE A RESTATEMENT OF THE STRICKEN SUBSECTION (4)(C) BELOW. MAYBE BILL SUPPORTERS WILL EXPLAIN WHY THEY STRIKE AND THEN REINSERT IN THEIR TESTIMONY.

~~(a)(3)~~ Upon collection, impact fees must be deposited in a special proprietary fund, which must be invested with all interest accruing to the fund.

~~(b)(4)~~ A governmental entity may impose impact fees on behalf of local districts.

~~(c)~~ If the impact fees are not collected or spent in accordance with the impact fee ordinance or resolution or in accordance with 7-6-1602, any

~~impact fees that were collected must be refunded to the person who owned the property at the time that the refund was due.~~

MSK COMMENTS: SEE MY ABOVE COMMENTS.

(2)(5) All impact fees imposed pursuant to the authority granted in this part must be paid no earlier than the date of issuance of a building permit if a building permit is required for the development or no earlier than the time of wastewater or water service connection or well or septic permitting.

(3)(6) A governmental entity may recoup costs of excess capacity in existing capital facilities improvements, when the excess capacity has been provided in anticipation of the needs of new development, by requiring impact fees for that portion of the facilities constructed for future users. The need to recoup costs for excess capacity must have been documented pursuant to 7-6-1602 in a manner that demonstrates the need for the excess capacity by a preconstruction needs assessment that demonstrated the need for the excess capacity.

MSK COMMENTS: AGAIN, THE AMENDMENTS USE THE TERM "NEEDS ASSESSMENT" WITHOUT DEFINING WHAT THAT MIGHT BE. THE CURRENT REQUIREMENT IS MEANT TO PREVENT A LOCAL GOVERNMENT FROM GOING BACK 100 YEARS TO COLLECT ROAD IMPACT FEES. ALTHOUGH I UNDERSTAND SOME LG'S ARE TRYING THAT ANYWAY.

This part does not prevent a governmental entity from continuing to assess an impact fee that recoups costs for excess capacity in an existing facility without the preconstruction needs assessment as long as the fee was enacted prior to [the effective date of this act] and is assessed prior to the transition required pursuant to [section 5].

MSK COMMENTS: I THINK THE INTENT OF THIS AMENDMENT IS TO GRANDFATHER IN ALL "ILLEGAL" (THAT IS "NOT IFA COMPLIANT") IMPACT FEES. HOWEVER, PLEASE NOTE THAT IT REALLY STATES: THIS PART DOES NOT PREVENT A GOVERNMENTAL ENTITY FROM CONTINUING TO ASSESS AN IMPACT FEE . . . AS LONG AS THE FEE . . . IS ASSESSED PRIOR TO THE TRANSITION . . ." SO I HAVE NO IDEA WHAT IT ACTUALLY DOES. AGAIN, MAYBE IT WILL BE EXPLAINED IN TESTIMONY.

The impact fees imposed to recoup the costs to provide the excess capacity must be based on the governmental entity's actual cost of acquiring, constructing, or upgrading the facility and must be no more than a proportionate share of the costs to provide the excess capacity.

(4)(7) Governmental entities may accept the dedication of land or the construction of public facilities in lieu of payment of impact fees if:

(a) the need for the dedication or construction is clearly documented in the needs assessment pursuant to 7-6-1602;

MSK COMMENTS: SEE AGAIN MY COMMENTS REGARDING THE "NEEDS ASSESSMENT" ABOVE. AND NOTE HOW "PURSUANT TO 7-6-1602" WAS STRICKEN IN SUBSECTION (6), PAGE 7 OF THIS MEMO, BUT HERE IT REMAINS IN THE IFA. AGAIN, I'LL BE INTERESTED IN HEARING FROM BILL SUPPORTERS ON THE NEED FOR, AND IMPACT OF, THE DISTINCTION.

(b) the land proposed for dedication for the public facilities to be constructed is determined to be appropriate for the proposed use by the governmental entity;

(c) formulas or procedures for determining the worth of proposed dedications or constructions are established as part of the impact fee ordinance or resolution; and

(d) a means to establish credits against future impact fee revenue has been created as part of the adopting ordinance or resolution if the dedication of land or construction of public facilities is of worth in excess of the impact fee due from an individual development.

~~(5)(8)~~ Impact fees may not be imposed for remodeling, rehabilitation, or other improvements to an existing structure or for rebuilding a damaged structure unless there is an increase in units that increase service demand as described in 7-6-1602(1)(j). If impact fees are imposed for remodeling, rehabilitation, or other improvements to an existing structure or use, only the net increase between the old and new demand may be imposed.

MSK COMMENTS: THIS AMENDMENT STRIKES THE REFERENCE TO (1)(J) BECAUSE (1)(J) ITSELF WAS STRICKEN ABOVE, PAGE 5 OF THIS MEMO. (1)(J) STATES: "(J) ESTABLISHES THE AMOUNT OF THE IMPACT FEE THAT WILL BE IMPOSED FOR EACH UNIT OF INCREASED SERVICE DEMAND" AGAIN, WITHOUT THIS CALCULATION, HOW WILL LG'S KNOW THE PROPER AMOUNT OF THE FEE? HOW DOES THE DEVELOPMENT COMMUNITY CHECK THE LG'S CALCULATIONS IF THERE ARE NO CALCULATIONS?

~~(6)(9)~~ This part does not prevent a governmental entity from granting refunds or credits:

(a) that it considers appropriate and that are consistent with the provisions of 7-6-1602 and this chapter; or

(b) in accordance with a voluntary agreement, consistent with the provisions of 7-6-1602 and this chapter, between the governmental entity and the individual or entity being assessed the impact fees.

~~(7) An impact fee represents a fee for service payable by all users creating additional demand on the facility.~~

MSK COMMENTS: THIS STRICKEN STATEMENT IS WHAT AN IMPACT FEE ACTUALLY IS. WHY IS THIS BASIC STATEMENT BEING STRICKEN? IF THE BILL SUPPORTERS THINK THIS STATEMENT IS INCORRECT – WHAT DO THEY THINK AN IMPACT FEE IS? WHAT WILL THE COURTS THINK THE LEGISLATURE MEANT BY STRIKING THIS LANGUAGE?

~~(8)~~(10) An impact fee ordinance or resolution must include a mechanism whereby under which a person charged an impact fee may appeal the charge if the person believes an error has been made."

MSK COMMENTS: GRAMMATICAL CHANGE. NO FURTHER COMMENT.

Section 4. Section 7-6-1604, MCA, is amended to read:

"7-6-1604. Impact fee advisory committee. (1) A governmental entity that intends to propose an impact fee ordinance or resolution shall establish an impact fee advisory committee.

(2) An impact fee advisory committee ~~must~~ should include at least one representative of the development community and one ~~certified public accountant~~ representative with some form of accounting background. The committee shall review and monitor the process of calculating, assessing, and spending impact fees.

(3) The impact fee advisory committee shall serve in an advisory capacity to the governing body of the governmental entity."

MSK COMMENTS: THE CHANGE FROM "MUST" TO "SHOULD" IS IMPORTANT AND WOULD ALLOW LG'S CREATE AN IMPACT FEE COMMITTEE WITH NO REPRESENTATION FROM THE PEOPLE ON WHOM THE FEE IS IMPOSED. THIS VIOLATES BASIC DUE PROCESS PROTECTIONS AS WELL AS A SIMPLE SENSE OF DECENCY. THE CHANGE FROM "ACCOUNTANT" TO "ACCOUNTING BACKGROUND" MAY BE IN RESPONSE TO SOME OF THE SMALLER JURISDICTIONS WHO ARE REPORTEDLY HAVING TROUBLE GETTING A CPA ON THEIR COMMITTEES.

NEW SECTION. Section 5. Transition. A general powers local government that is imposing impact fees adopted on or before [the effective date of this act] shall bring those fees into compliance with [this act] by December 1, 2007.

NEW SECTION. **Section 6. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 7. Effective date.** [This act] is effective on passage and approval.

NEW SECTION. **Section 8. Applicability.** (1) [This act] applies only to the portion of an impact fee ordinance or resolution enacted or amended by a self-governing local government on or after [the effective date of this act].

(2) Except when an impact fee ordinance or resolution is amended as provided in subsection (1), [this act] may not be construed to affect any portion of an ordinance or resolution enacted prior to [the effective date of this act].

MSK COMMENTS: I AM UNCLEAR AT THIS POINT AS TO THE ACTUAL EFFECT OF THE ABOVE CLAUSES, BOTH INDIVIDUALLY AND, MORE IMPORTANTLY, WHEN CONSIDERED AS A WHOLE. FURTHER RESEARCH IS REQUIRED.